



Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: NVT Technologies, Inc.

File: B-256072; B-256072.2

Date: May 6, 1994

Jeffrey A. Lovitky, Esq., for the protester.
Donald E. Barnhill, Esq., and Joan K. Fiorino, Esq., East & Barnhill, for Ogden Allied Eastern States Maintenance Corporation, an interested party.
Michael J. Adams, Esq., and Beth Kelly, Esq., Department of the Army, for the agency.
Scott H. Riback, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency properly rejected protester's bid as nonresponsive where period of contract performance was extended by amendment and protester, while acknowledging receipt of amendment, did not include prices for the additional period of performance.
2. Protest challenging price reasonableness determination with respect to awardee's bid for operations and maintenance contract is denied where determination was reasonably based on comparison with contract price for operations and maintenance services at another agency facility.
3. Protest that awardee's bid was nonresponsive is dismissed as untimely where allegation was first raised after protester's receipt of agency report and record shows that protester made no post-bid opening attempt to examine awardee's bid; protesters are required to act promptly after public bid opening to obtain information on bids received so that, upon learning of agency's award decision, protester will be aware of any alleged defect in winning bid.

DECISION

NVT Technologies, Inc. protests the Department of the Army's award of a contract to Ogden Allied Eastern States Maintenance Corporation under invitation for bids (IFB) No. DACW63-93-B-0081, for operations and maintenance services at a Drug Enforcement Agency facility at Alliance Airport in Fort Worth, Texas. NVT contends that the agency

improperly rejected its bid as nonresponsive. In addition, NVT challenges the agency's determination that Ogden's bid was responsive and its price reasonable.

We deny the protest in part and dismiss it in part.

The IFB called for fixed prices to perform various operations and maintenance services at Alliance Airport. As originally issued, the solicitation provided that performance was to be for a period of 12 months, from November 1, 1993 (or the date of award, whichever was later) to October 31, 1994. The IFB's original section B bid schedule required bidders to provide monthly unit prices and extended prices for six separate line items; bidders were to arrive at the extended prices by multiplying their monthly unit prices by 12. By subsequent amendments (Nos. 001 and 002), the agency changed the duration of the contract from 12 months to 14 months, and extended the period of performance through December 31, 1994. These amendments contained a revised bid schedule which was to be substituted for the original; the revised bid schedule provided for calculating the extended prices by multiplying the monthly unit prices by 14.

The agency received three timely bids in response to the solicitation. The low bid was submitted by a firm determined nonresponsive by the agency, the second low by NVT, and the third low by Ogden. The agency reviewed NVT's bid and determined that it was nonresponsive. Although NVT had acknowledged all of the amendments in its bid, it entered its prices on the original bid schedule rather than on the revised one; consequently, NVT did not enter a price for the last 2 months of the 14-month performance period specified in the amendments, and the schedule on which it entered its prices incorrectly specified the earlier period of performance, which did not include the months of November and December 1994. After rejecting NVT's bid as nonresponsive, and finding Ogden's bid price reasonable, the Army made award to Ogden as the low-priced, responsive, responsible bidder.

NVT argues that its bid was responsive and should have been accepted. The protester contends that its failure to use the revised bid schedule was a minor informality which should have been waived because it acknowledged all of the IFB's amendments, and because its overall price can be determined simply by multiplying its monthly unit prices by 14 rather than 12. NVT further contends that by acknowledging the amendments, it obligated itself to perform for 14 months.

In order to be responsive, a bid must represent an unequivocal offer to comply with all of the material terms

of the IFB. John P. Ingram, Jr. & Assocs., Inc., B-250546, Feb. 9, 1993, 93-1 CPD ¶ 117. Where the agency amends the solicitation to add additional quantities to its requirements, mere acknowledgement of the amendment does not itself represent an unequivocal bid for the increased quantities. Environmental Health Research & Testing, Inc., B-246601, Mar. 10, 1992, 92-1 CPD ¶ 274; John Mondrick Plumbing & Heating, Inc., B-201675.3, July 31, 1981, 81-2 CPD ¶ 73. A bid which does not include a price for increased quantities added by amendment is ambiguous, because it creates doubt both as to the intended price for the added quantity, as well as the bidder's intent to obligate itself to perform the additional requirement. Environmental Health Research & Testing, Inc., *supra*; John Mondrick Plumbing & Heating, Inc., *supra*.

Here, because NVT did not include a price for the increased quantities added by the amendments, it is not possible to determine from the face of its bid what its price would have been for the added work. Although NVT now contends that its price for the additional 2 months would have been the same as its price for the prior 12 months, its otherwise nonresponsive bid cannot be made responsive by such post-bid opening explanations, since to allow this would, in effect, give NVT the advantage of electing to accept or reject the contract by choosing whether to make its bid responsive. Environmental Health Research & Testing, Inc., *supra*. Further, notwithstanding NVT's acknowledgement of the amendments, its failure to price the added work creates doubt concerning whether the firm intended to legally obligate itself to perform the work. *Id.*

NVT contends that the change effected by the amendments may properly be waived because it is de minimis when compared to the overall contract value, and would not affect the relative standing of the bidders.

Our Office has recognized a limited exception to the rule that a failure to use a revised bid schedule renders a bid nonresponsive. Under this exception, a bidder's failure to use an amended bid schedule may be waived where (1) the items added by the amendment are divisible from the original solicitation's requirements; (2) the cost of the omitted items is de minimis as compared to the contract's total cost; and (3) the waiver would clearly not affect the competitive standing of the bidders. Leslie & Elliott Co., 64 Comp. Gen. 279 (1985), 85-1 CPD ¶ 212, *aff'd*, Ryan Elec. Co.--Recon., B-218246.2, Apr. 1, 1985, 85-1 CPD ¶ 366.

Here, these conditions are not met. The amended IFB reflects the Army's expectation that it will obtain from a single contractor comprehensive operations and maintenance support services for the entire 14 months, and that these

services will be performed after the awardee's employees have been trained in the particular requirements of the facility. It would be inconsistent with this basic procurement approach to consider bringing in a new contractor, which would have to gear up its operations and train its employees in the particular requirements of the facility, for only the final 2 months of performance. Under these circumstances, we cannot say that the last 2 months of the contract's performance period are clearly divisible from the balance of the contract. See Penn Perry, Inc., B-241777, Mar. 1, 1991, 91-1 CPD ¶ 235. In addition, the record shows that the increase in NVT's price for the additional 2 months would be approximately 13.2 percent of its original bid and approximately 7.6 percent of the independent government estimate (IGE). This increase, in our view, is clearly not de minimis. Cf. Leslie & Elliott Co., supra, where a difference of 0.214 percent of the protester's original bid and 0.238 percent of the IGE was found to be de minimis.

NVT argues that its bid was responsive because the IFB allowed firms to bid on less than the entire quantity called for. In our view, however, NVT misread the solicitation in this regard. The IFB contains three provisions relating to this issue. NVT relies on the solicitation's instructions to offerors, which state that "[u]nless otherwise provided in the schedule, bids may be submitted for quantities less than those specified." This provision, however, allows for bids for less than the full requirement only where no other provision of the IFB precludes it. Here, the section B bid schedule in the solicitation states that "[b]idders must bid on all line items. Failure to bid on any line item will be cause for rejection of the bid." In addition, in setting forth the basis for award, the IFB states that "[o]nly one award will be made for all items specified in the bid schedule, section B. Any bid on less than the total as specified in section B will be considered nonresponsive and rejected." These provisions, when read together, clearly required firms to submit bids for the entire quantity specified. We therefore find that the Army properly rejected NVT's bid as nonresponsive.

NVT argues that award to Ogden was improper because the Army erroneously found the firm's price reasonable. In this regard, NVT essentially challenges the accuracy of the Army's IGE. According to NVT, the IGE, which was \$400,000 to \$600,000, is inaccurate because it was developed based on the cost of an operations and maintenance contract for another Drug Enforcement Agency facility in Washington, D.C., which is larger than the facility at Fort Worth. The protester contends that the differences in location and size of the two facilities suggest that the estimate relied on by the agency was not indicative of the lower cost of

contracting at Fort Worth, NVT also questions the IGE on the basis that the two facilities are of a different type; according to NVT, the Washington, D.C., facility is an office building, whereas the Fort Worth facility is an airport facility. NVT concludes that the IGE was not a reasonable estimate of the probable cost and that, therefore, the Army's determination that Ogden's price was reasonable based on a comparison to that estimate also was unreasonable.

A determination of price reasonableness may be based on any number of evaluation techniques, including comparison of the bids or offers received with an IGE. Federal Acquisition Regulation (FAR) §§ 14.407.2, 15.805.2. Dutra/AmClyde Joint Venture, B-249364.2, Dec. 30, 1992, 92-2 CPD ¶ 453. Agencies generally may base an IGE on the cost of contracting for similar services at other locations. Id. Since an agency's decision regarding price reasonableness necessarily involves the exercise of considerable discretion, our Office will not question an agency's determination unless it clearly lacks a reasonable basis. Id.

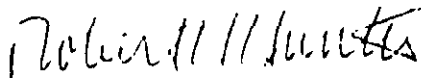
The record shows that the Army arrived at its IGE after consulting with Drug Enforcement Agency officials in Washington, D.C., and by comparing the cost of a similar operations and maintenance contract at a facility in Washington, D.C. The record indicates that first the Washington, D.C., contract price was reduced to account for the difference in the size of the facilities (the Washington, D.C., facility was larger); the contracting officer then adopted the "low" side of the resulting estimate (that is, \$400,000) as a fairly accurate reflection of the lower costs of doing business in the Fort Worth area (as opposed to Washington, D.C.). The Army found Ogden's price of \$400,681.24 reasonable because it was within 0.17 percent of the final IGE. Given the downward adjustments made to account for the different installation sizes and locations, we think comparison with the operations and maintenance contract in Washington was a reasonable basis for arriving at the IGE.

Although NVT challenges the IGE on grounds that the two facilities are of a different type, the protester has not explained, nor is it evident from the record, why any differences in the types of facilities would justify a further downward adjustment in the IGE. In this regard, the record shows that the Fort Worth facility is a 12-acre compound containing not only an office complex but also 40,000 square feet of shop/support space, an 83,400-square-foot airplane hangar, a guard house, and a pump house. The operations and maintenance contractor will be responsible for snow and ice removal for the 12-acre complex. The

contractor will also be responsible for architectural and structural maintenance and repairs to all of the facility's buildings, including the specialized buildings described above. In addition, the contractor will be required to maintain various specialized mechanical systems such as the airplane hangar's sliding door system, cranes, an automated waste shredding system, sophisticated alarm and security systems, and various specialized firefighting equipment. Given the nature of the facility, it appears that the contractor will need personnel with various specialized skills in addition to the type of personnel traditionally employed for the operation and maintenance of an office-type facility. NVT has not shown that the cost of the personnel required to operate and maintain a specialized facility such as the Fort Worth facility will be less than the cost of the personnel necessary to maintain an office complex. In sum, NVT's generalized objections to the agency's IGE do not show that it was unreasonably high. We therefore find no basis to question the Army's price reasonableness determination, which was based on the IGE.

Finally, based upon its review of Ogden's bid, NVT contends that the awardee's bid was nonresponsive. We dismiss this allegation as untimely. The record shows that NVT neither attended bid opening, nor made any attempt to obtain a copy of Ogden's bid through a post-bid opening inquiry or Freedom of Information Act request. NVT first obtained a copy of Ogden's bid materials when they were furnished by the Army as part of its filings with our Office, and NVT did not allege that the firm's bid was nonresponsive before filing its comments on the agency report. Where, as here, bids are opened publicly, protesters are required to make some diligent effort to review the bids shortly after bid opening, and may not wait to do so until the agency announces its award decision. Thomas May Constr. Co., B-255683, Mar. 23, 1994, 94-1 CPD ¶ 210. Since NVT made no attempt to review Ogden's bid either before the Army's award decision, or at any time before receiving the agency report, its allegations concerning the responsiveness of Ogden's bid are untimely. We therefore dismiss this aspect of NVT's protest.

The protest is denied in part and dismissed in part.


 1 Robert P. Murphy
 Acting General Counsel